No. 84-669

In The

Supreme Court of the United States

October Term, 1984

JAMES PORTER, *Pro Se,*

Petitioner,

vs.

PETER BUTTERICK, COMMISSIONER FOR THE BOROUGH OF BEACH HAVEN, NEW JERSEY; RICHARD CROSTA, SUPERINTENDENT OF PUBLIC WORKS, BOROUGH OF BEACH HAVEN, NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES PORTER
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court erred in formulating and applying a legal preception, acting on a hearsay statement that said driveway was not in use.

2. Whether the respondents have failed before the District Court to produce a preponderance of evidence needed in civil cases, to show that said driveway was not in constant use.

3. Petitioner was not informed by the Clerk of the District Court that a request for oral argument would be granted to respondents automatically, thereby placing a person acting *pro se* at a great disadvantage.

4. Petitioner went to the District Courthouse on December 5, 1983; the day of request for oral argument and was told by Evans C. Abrapidis, law clerk for the Hon. Judge Devine:

> "I have nothing/information on the *Request,* there is nothing here, go home."

Said statement was made after Mr. Abrapidis made several phone calls throughout the courthouse.

5. Petitioner left the courthouse on the directive of Evans C. Abrapidis, law clerk for Judge Devine, which resulted in the dismissal of the complaint.

6. Petitioner was never afforded the opportunity to present to the District Court, physical evidence that proved said driveway was in constant use, including photos of my cars in said driveway in the year 1967 and the following years.

7. Whether the District Court was without knowledge or information in its expressed opinion that said Borough (respondents):

> "Have taken a step, albeit a minute one, towards improving traffic and parking conditions."

8. Said driveway was not closed on a directive or order from the officers of the Borough of Beach Haven, but was closed by Richard Crostra, who was then and now, without authority to do so.

9. Whether the District Court was without knowledge or information that said Borough violates the "Driveway Ordinance" every time a building permit is issued by allowing a private home or duplex two and three driveways that exit into the public street.

10. Petitioner's legal driveway was the only driveway closed in the Borough of Beach Haven. There are hundreds of illegal driveways that exist this very day in said Borough that are permitted to remain open. The question before this Court is "Why?".

11. Whether the District Court has failed/ignored the rights of petitioner covered by the Grandfathers Rights Clause.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The petitioner, James Porter, *Pro Se,* respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on May 21, 1984. A copy of the memorandum is attached as Appendix C, 4a.

Petitioner respectfully prays that the Court will also review the judgment of the United States District Court, District of New

Jersey, Trenton, New Jersey, entered December 5, 1983, a copy of said opinion and order attached as Appendix D and E, 6a-16a.

The United States Court of Appeals for the Third Circuit denied petitioner's petition for rehearing and suggestion for rehearing *en banc* dated August 6, 1984. Copy of said order is attached as Appendix A, 1a.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions involved are:

Grandfathers Rights Clause; United States Constitution, Fourteenth Amendment (equal protection); United States Constitution, First Amendment (the abridgement of a petition for a redress of grievances — intimidation — closing driveway morning of hearing, August 20, 1982); United States Constitution, Fifth Amendment (deprived of property use without just compensation).

STATEMENT OF THE CASE

On July 1979, an attempt to close said driveway by Chief of Police, Edward Myers, was stopped upon being informed by the law firm of the respondents in this case that said driveway was protected by "Grandfather Rights" having been in existence prior to any Borough ordinances governing private driveways.

Said driveway has been in constant use over seventy-five years; first for horses, later for autos.

Despite findings of July 1979, respondent Crostra asserted himself in this case on the morning of August 20, 1982, by having

said driveway closed on the very day that petitioner was to appear in the local court regarding a complaint filed by petitioner against said Borough on housing and parking violations. This intimidation is an infringement on petitioner's freedom of speech under the First Amendment.

Said driveway was closed on the directive of respondent Crostra, who does not have any authority or jurisdiction within said Borough to regulate or enforce any Borough ordinances within said Borough or, was Crostra given a directive or jurisdiction by any authorized officer of the Borough to close said driveway.

Respondent Crostra is employed by said Borough to supervise the collection of trash and garbage in the Borough.

REASONS FOR GRANTING THE WRIT

The denial of the "Grandfather Rights Clause" by the District Court of New Jersey, Trenton and the refusal of the Third District Court of Appeals to uphold petitioner's rights under said "Grandfather Rights Clause":

> "The Equal Protection Clause applies to all citizens of the United States not just for the choice few."

has denied petitioner equal protection of the law.

Equal protection and application of the laws goes to the very heart of the American ideal of fairness. As noted by this Court in the opinion of *Bolling v. Sharpe,* 347 U.S. 497 (1954):

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard

> of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases." 347 U.S. 497, 498-99.

The Equal Protection Clause of the Fourteenth Amendment calls for evenhandedness in the application of the laws of the sovereign. Justice Stevens recently observed that:

> "The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'
>
> The Clause announces a fundamental principle: the State must govern impartially. General rules that apply to all persons within the jurisdiction unquestionably comply with the principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise."

New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88 (1979). *See also, Lehr v. Robertson,* ____ U.S. ____, 103 S. Ct. 2985, 2995-96 (1983).

It has also been noted that the promise of equal protection of the laws not only involves the enactment of fair laws *but also the fair application of the laws.* For example, in the opinion of *United States v. Falk,* 479 F. 2d 606 (7th Cir. 1973), the court held: "Promise of equal protection of laws is not limited to enactment of fair and impartial legislation, but necessarily extends to application of these laws." Furthermore, unequal application of a law, fair on its face, may act as a denial of equal protection. *Zeigler v. Jackson,* 638 F. 2d 776 (5th Cir. 1981).

Petitioner submits that the United States District Court of the State of New Jersey, Trenton and the United States Court of Appeals for the Third Circuit failed to evenly and fairly apply the law when deciding petitioner's rights due under the "Grandfather Rights Clause".

CONCLUSION

For the foregoing reasons, petitioner James Porter, *Pro Se*, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit and the District Court of New Jersey, Trenton.

Respectfully submitted,

JAMES PORTER
Petitioner, Pro Se

APPENDIX A — SUR PETITION FOR REHEARING DATED AUGUST 6, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5925

JAMES PORTER

Appellant

vs.

PETER BUTTERICK, COMMISSIONER FOR THE BOROUGH OF BEACH HAVEN, NEW JERSEY, RICHARD CROSTA, SUPERINTENDENT OF PUBLIC WORKS, BOROUGH OF BEACH HAVEN, NEW JERSEY

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: August 6, 1984

s/ (illegible)
Judge

APPENDIX B — ORDER GRANTING MOTION DATED JULY 10, 1984

July 10, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5925

JAMES PORTER,

Appellant

vs.

PETER BUTERICK, etc.

Present: HUNTER, *Circuit Judge*

1. Motion for leave to file petition for rehearing before the Court in banc out of time by Appellant pro se.

2. For your information the Judgment Order was entered on May 25, 1984. On June 28, 1984 an Order was filed denying appellant's motion for stay of mandate which was treated as a Motion for Reconsideration.

3. Copy of this Court's June 28, 1984 Order.

4. Copy of Appellant's Petition for Rehearing before the Court in banc.

in the above-entitled case. Any Answer which would be due by July 12, 1984 will be forwarded upon receipt of same.

Appendix B

Respectfully,

s/ Sally Mrvos
Clerk
DIRECT DIAL
597-3136

CH
enc.

The foregoing motion is entered.

By the Court,

s/ Hunter
Circuit Judge

Dated: July 20, 1984

APPENDIX C — JUDGMENT ORDER DATED MAY 25, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5925

JAMES PORTER,

Appellant

v.

PETER BUTTERICK, COMMISSIONER FOR THE BOROUGH OF BEACH HAVEN, NEW JERSEY, RICHARD CROSTA, SUPERINTENDENT OF PUBLIC WORKS, BOROUGH OF BEACH HAVEN, NEW JERSEY

Appeal From the United States District Court For the District of New Jersey - Trenton
D.C. Docket No. 83-00893
Before Honorable John W. Bissell

Submitted Under Third Circuit Rule 12(6) May 21, 1984

Before HUNTER, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Appendix C

By the Court,

s/ Hunter
Circuit Judge

Attest:

s/ Sally Mrvos
Clerk

Dated: May 25, 1984

APPENDIX D — ORAL OPINION DATED DECEMBER 5, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 83-839

JAMES PORTER,

Plaintiff,

vs.

PETER BUTERICK, etc., et al.,

Defendants.

December 5, 1983
Trenton, New Jersey

Before The Honorable JOHN W. BISSELL, U.S.D.J.

APPEARANCE:

SHACKLETON, HAZELTINE
& DASTI,
By: JAMES BISHOP, ESQ.
For the Defendants

Helen C. Johnson
Official Court Reporter
United States District Court
Trenton, New Jersey 08602

Appendix D

THE COURT: Mr. Porter did not appear.

MR. BISHOP: I am James Bishop of Shackleton, Hazeltine & Dasti for the defendants.

THE COURT: Counsel, based upon the papers alone submitted in this matter, it is quite clear to the Court that you are entitled to relief.

I have prepared a draft of an opinion which I am going to render on the record at this time.

The present action arises out of a complaint originally filed in the United States District Court for the Eastern District of Pennsylvania by the pro se plaintiff, James Porter, on October 4, 1982. The complaint was subsequently dismissed without prejudice due to a lack of proper venue. Thereafter, on March 9, 1983, plaintiff filed the identical complaint with this court. Therein he alleges the defendants violated his constitutional right to equal protection under the law removing yellow lines in front of his "driveway." The purpose of these lines was to put the general public on notice that parking was prohibited in that spot. Additionally, he charges his due process rights under the Fifth Amendment have been transgressed. Of course, we are dealing with the State action. It would be the Fourteenth Amendment. That was an error which I have corrected.

Defendants named in the action are Peter Buterick, Commissioner for the Borough of Beach Haven, New Jersey, and Richard Crosta, Superintendent of Public Works for the Borough of Beach Haven. As relief, plaintiff seeks compensatory and punitive damages.

Appendix D

The parties are currently before this Court pursuant to defendants' motion to dismiss the complaint or, in the alternative, for summary judgment. In support of their motion, defendants argue that there has occurred no cognizable breach of the Equal Protection Clause of the Fourteenth Amendment. Consequently, so they conclude, it follows that plaintiff's claims for damages are barred by the provisions of the New Jersey Tort Claims Act. In opposition, plaintiff claims that the defendants were predisposed to deliberately deprive him of the use of his driveway, and that "They were invidious and purposeful in their discrimination against" him.

The relevant facts surrounding the case at bar are not in dispute. Plaintiff, a resident of Pennsylvania, is a property owner in the shore community of the Borough of Beach Haven. He owns a home that is more than 75 years old with a paved driveway on one side and a grass "driveway" on the other. It is the grass driveway that is the focal point of this lawsuit. This driveway had at one time been used by horse-drawn carriages and has never been paved.

Prior to 1982, there existed painted yellow lines on the public street adjacent to this driveway that prohibited the general public from parking there. In July of 1979, defendant/or their employees appeared before plaintiff's house for the purpose of removing these yellow lines.

Plaintiff informed these individuals that the driveway had been in existence for over 75 years, that it pre-dated any applicable Borough ordinance, and that, therefore, the yellow lines should remain in place. The yellow lines were left in existence until August 20, 1982, at which time they were removed.

Appendix D

The Borough, it would appear, removed the yellow lines from before the grass driveway because plaintiff no longer used this driveway. The painted yellow lines proscribing public parking that are adjacent to his paved driveway remain in existence.

The gravamen of plaintiff's complaint involves an alleged transgression of the Equal Protection Clause. He argues that other residents on his block have driveways which are no longer in use and are, in fact, blocked off by picket fences. Despite their non-use, he claims that they retain the yellow lines adjacent to them proscribing public parking thereon. He insists that defendants, in removing the yellow lines from before his driveway, alone, deliberately discriminated against him. These allegations are without merit and do not begin to rise to the level of a violation of the Equal Protection Clause.

In order to establish a violation of equal protection, the complainant must demonstrate that the classification challenged invidiously implicates a suspect class or infringes upon a fundamental interest. In the absence of such a showing, a classification need merely be rationally related to a legitimate interest of the governmental body in order to pass constitutional muster. *Loving v. Virginia,* 388 U.S. 1 (1967); *Reed v. Reed,* 404 U.S. 70 (1971).

Stated otherwise, "Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 312 (1976). In an accompanying footnote to the above quote, the Supreme Court delineated the rights deemed fundamental to United States citizens. These are rights of a uniquely private nature:

the right to vote, the right of interstate travel, rights guaranteed by the First Amendment, and the right to procreate.

The Court has omitted the citations appearing in the footnote in support of those statements.

Although plaintiff may feel that he has a uniquely personal interest in the right to free egress and ingress to a grass driveway, it is beyond dispute that this "interest" is not the fundamental type worthy of protection under the Equal Protection Clause. Similarly, plaintiff has failed to demonstrate that the defendants' action operates to the peculiar disadvantage of a suspect class. In an additional footnote also accompanying the Court's decision in *Massachusetts Board of Retirement v. Murgia* case, that Court set forth the classifications which it deemed inherently suspect. These include alienage, race and ancentry. Once again, it is readily apparent that the "classification" of which plaintiff complains is not worthy of strict scrutiny under the Equal Protection Clause.

Accordingly, defendants need merely show that their action was rationally related to a legitimate governmental interest. In the case at bar, defendants have easily met this minimal standard. The removal of the traffic markings from before plaintiff's unused driveway is plainly related to the Borough's legitimate concern in regulating parking conditions.

The Borough of Beach Haven is a relatively small community with a necessarily limited amount of public parking spaces. This limited amount of space creates traffic congestion which is especially noticeable during the summer tourist season. Thus, by freeing even this single space adjacent to plaintiff's unused grass driveway, defendants have taken a step, albeit a minute one, toward improving traffic and parking conditions in Beach Haven.

Appendix D

The Borough continues to maintain traffic markings in the space adjacent to plaintiff's paved driveway, thus preserving his free egress and ingress to the driveway which he in fact uses. For plaintiff to assert that he has the right to "tie up" public property before a driveway that is not in use borders on the frivolous.

Therefore, this Court finds that there has been no violation of the Equal Protection Clause of the Fourteenth Amendment. This is true notwithstanding plaintiff's argument that defendants chose to selectively exercise their authority against him. The municipal officials of Beach Haven are vested by statute with the authority and discretion to regulate traffic in their community. *See* N.J.S.A. 39:4-183.1; 39:4-197. These statutes give municipalities the power to pass ordinances "regulating the parking of vehicles on streets and portions thereof . . ." *Ibid.*

Defendants have exercised this grant of authority by enacting the parking regulations embodied in Section 119-12(G) of the Beach Haven Code. (*See* Affidavit of Butrick in this case.)

Pursuant to these regulations, defendants, in their discretion, chose to act against plaintiff's unused driveway instead of the unused driveways of other Beach Haven residents. This constitutes no equal protection transgression, however, for "The conscious exercise of some selectivity in enforcement is not in itself a Federal constitutional violation. Even though the statistics . . . might employ a policy of selective enforcement, it is not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles,* 368 U.S. 448, 456 (1962). *See also: Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978). In the absence of such an allegation, a claim such as that presently considered cannot stand.

Appendix D

Plaintiff, although not clearly alleging so in his complaint, has apparently charged defendants with a deprivation of his property, without just compensation, in contravention of the Due Process Clause of the Fourteenth Amendment. This contention is not convincing, for plaintiff does not even make use of this driveway. The paved driveway that he does utilize is still provided with the appropriate traffic markings. More importantly, there has simply been no "taking" of plaintiff's private property. He still owns, and has not been deprived of, the land which many years ago ceased being used for even horse-drawn carriages. The only property "taken" is the public property on the particular public thoroughfare in Beach Haven.

It might be contended that in permitting the public to park in this formerly restricted spot, plaintiff's property has been "taken" by a concomitant decline in the value of his land. However, this contention is also meritless. "Although there is no concise rule readily applicable to all cases, a taking must at least amount to a substantial interference with the property so as to destroy or lessen its value." *Harris v. U.S.*, 467 F.2d 801, 803 (8th Cir. 1972).

In the case at bar, the interference with plaintiff's property, if there has been any at all, has been *de minimis* at best. Similarly, plaintiff's property value has not been destroyed nor lessened for he does not use this "driveway" as a driveway. The present situation might call for a different determination if this grass driveway was used by plaintiff in its capacity to maintain vehicles. However, as stated, plaintiff has a paved driveway to which the Borough provides the appropriate proscriptive traffic markings, and he simply does not use the grass driveway for vehicular traffic. Plaintiff's Fifth Amendment claim is dismissed.

Appendix D

The defendants' final argument in support of the present motion is that any damage claims asserted by plaintiff are barred by the New Jersey Tort Claims Act, which provides immunity to the defendants. This argument is correct. Under this statute, N.J.S.A. 59:1-1, *et seq.*, public employees, such as defendants herein, cannot be held liable for injury resulting from a good-faith exercise of judgment and discretion vested in them with regard to traffic markings. In the case at bar, defendants, acting in their official capacities, exercise their vested discretion in favor of removing the subject yellow line. They reached a defensible determination that plaintiff no longer used the grass driveway and that the space adjacent to this area could be best utilized as a public parking space. In this respect this Court cannot say that the defendants failed to exercise reasonable judgment in the commission of a discretionary act which they undertook.

For all of the reasons set forth above, the complaint fails to state a cognizable claim against the present defendants.

This Court has considered this matter as a motion for summary judgment, and some claims outside the pleadings were presented. As the above indicates, this Court has and does determine there is no genuine issue as to any material fact. The factual recitation in the preceding portion of this opinion is those of facts which are basically uncontroverted and matters of public record. The foregoing constitutes this Court's findings of fact and conclusions of law as contemplated by Federal Rule 56.

Summary judgment is granted to the defendants dismissing all claims in the complaint with prejudice.

Counsel, are you applying for costs in this matter?

Appendix D

MR. BISHOP: Yes, we are.

THE COURT: With prejudice and with costs.

MR. BISHOP: Thank you, your Honor.

I will submit an order.

THE COURT: Was one submitted with the papers initially?

Let's have a look. I will endeavor to locate the order and if it is here I will make use of it. If, for one reason or another, it is not available or inappropriate, my Clerk will contact you.

MR. BISHOP: I have found it. I would ask, perhaps, your Honor could add "with costs."

APPENDIX E — ORDER AND JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT

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Attorneys for Defendants
13197

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY (TRENTON)

Docket No. 83-839

Assigned to the Hon. John W. Bissell

CIVIL ACTION

Plaintiff

JAMES PORTER,

vs.

Defendant

PETER BUTERICK, Commissioner for the Borough of Beach Haven, New Jersey and RICHARD CROSTA, Superintendent of Public Works, Borough of Beach Haven, New Jersey.

THIS MATTER having been brought before the Court by Shackleton, Hazeltine and Dasti, attorneys for Defendants, upon notice to Plaintiff pro se; and the court having considered the

matter as a motion for summary judgment upon the opposing and moving papers; and plaintiff having failed to appear for oral argument and it appearing that no genuine issue of material fact exists and that Defendants are entitled to judgment as a matter of law;

IT IS on this 5th day of December, 1983, ORDERED and

ADJUDGED that summary judgment is granted to defendants and Plaintiff's Complaint shall be and is hereby dismissed, with prejudice and with costs.

s/ John W. Bissell
U.S.D.C.J.
JOHN W. BISSELL
UNITED STATES
DISTRICT JUDGE